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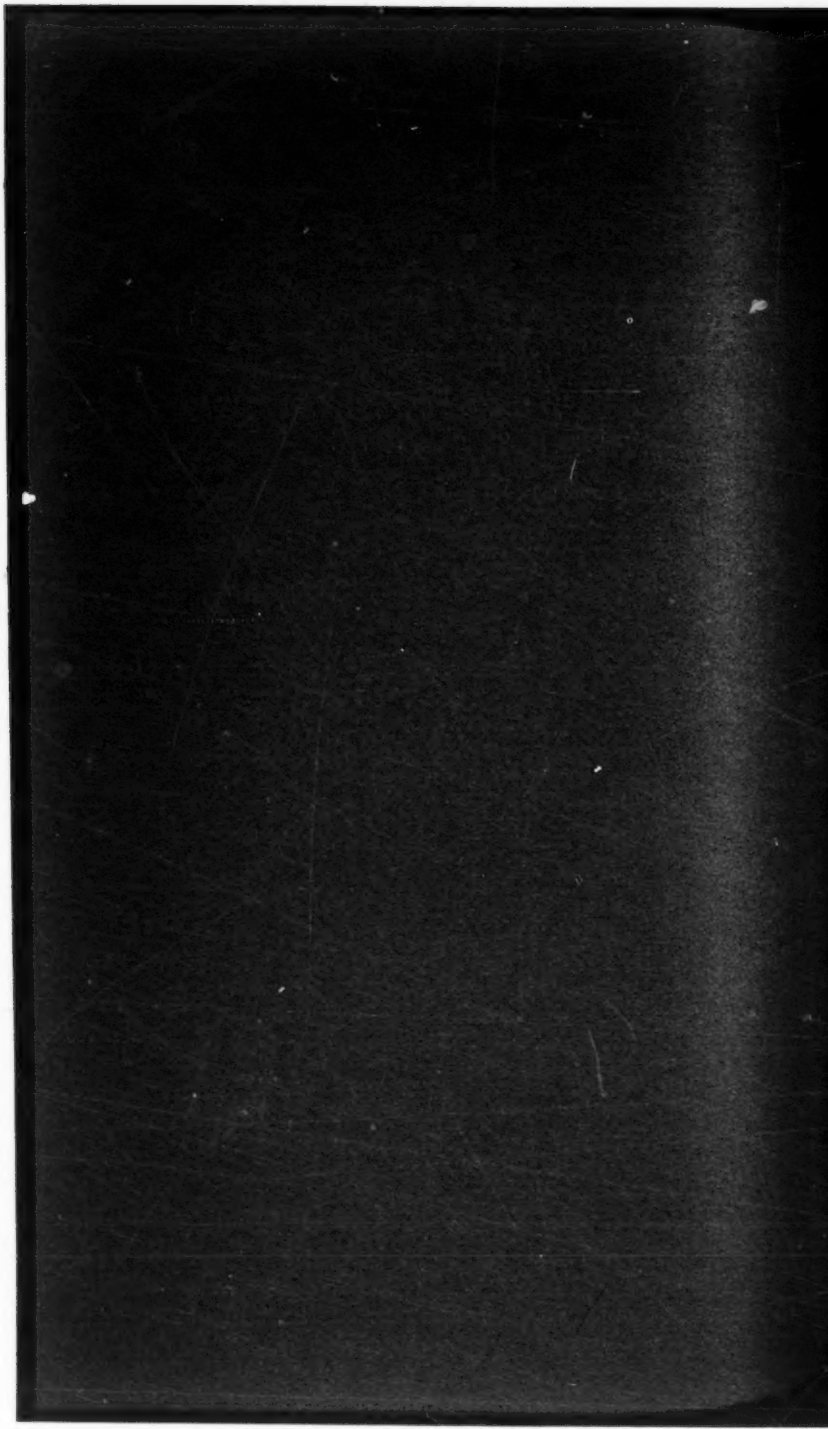

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 300.

JOSEPH H. BEALS, PLAINTIFF IN ERROR,

vs.

JAMES J. CONE AND LYMAN ROBISON, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Brief of Defendants in Error in Opposition to Application for Supersedeas.

This application is made after the case has been docketed for a period of nearly nine months, and is, at the outset, open to the objection that it comes too late to demand any consideration by the court. It succeeds an application heretofore made to Mr. Justice Brewer, and is supported by the brief which was then prepared and filed. No additional authority is cited, and no additional fact relied on, except that since the hearing before Justice Brewer the Ophir Lode mining claim has been entered, and is proceeding to patent. This state-

ment appears in an affidavit by plaintiff in error verified some time during the current year, no other date being given.

The history of this case since the petition for the rehearing was denied by the supreme court of the State is briefly as follows: The plaintiff in error filed a motion in the lower court to stay the mandate to the trial court until his application for supersedeas by this court or some justice thereof could be determined. In the printed brief filed to sustain that motion he called attention to the fact that its refusal would permit the defendants in error to make entry of the mine in controversy, notwithstanding the filing of the record in the Supreme Court. The stay was granted; whereupon plaintiff in error applied, as stated, to his honor Justice Brewer for a writ of error operating as a supersedeas. His honor, after due consideration of the record and the application, allowed a writ of error, but declined to grant the supersedeas prayed for. Hence the suing out of the writ in no wise operated to prevent the usual proceeding after affirmance in the State courts. Shortly after the defendants in error were apprised of the action of his honor Justice Brewer, they applied for and obtained a mandate from the court below to the district court of El Paso county, Colorado, upon which a writ of execution and possession duly issued upon the judgment, and by that process the defendants in error were placed in possession of the Ophir mine. The date of the Supreme Court mandate was June 17, 1901. Shortly afterwards, and some time in the latter part of July, the register and receiver of the land office at Pueblo allowed an entry of the claim, and receiver's receipt was issued therefor. This was done in the usual course of procedure, and under the laws of the United States and the rules of the General Land Office.

Shortly thereafter the defendants in error prepared and have since filed a motion to dismiss the writ of error, because no Federal question being involved in the record, no jurisdiction attaches. This motion is supplemented by argument

duly filed in support of same, the decision of the supreme court of Colorado being published therewith as an appendix. Pending that motion this application for a supersedeas is made.

The usual estimates of the clerk for the cost of printing the transcript were made and furnished the plaintiff in error. He has had abundant time to respond to the clerk's notice and make the required provision for printing the record. This has not been done. Rule 10 provides that if neither party pays the clerk's estimate, and the record shall not be printed when a case is reached in the regular call of the docket, it shall be dismissed. It is true that this application comes in advance of the reaching of the case in the regular call. Nevertheless, we submit that plaintiff in error should not at this time be heard upon this or any other motion in his behalf until the record has been printed.

The brief of the defendants in error in support of their motion to dismiss, in our judgment, covers practically all the reasons assigned by the plaintiff in error in support of his application. In view of that fact and of the additional circumstance that his honor Mr. Justice Brewer has already considered and determined the question, we might well submit the application without further comment. Nevertheless, we have concluded to respond to some of the specific statements contained in counsel's brief, lest our failure to do so might be considered, by him at least, as a concession of their soundness.

Counsel concede that the case falls within the last provision of section 709 of the Revised Statutes. Unless something in the record can be pointed out as bringing it directly within the requirements of the section quoted, there can be no jurisdiction, and consequently no necessity for considering the question of supersedeas. Counsel's claim virtually is that, because the decisions of the Secretary of the Interior upon the original application of Ophir for a patent were excluded as testimony, and because a contro-

verted question of fact concerning the annual expenditure of $100 upon the claim for the year 1897 was submitted to the jury with an instruction that after a forfeiture a relocation is essential to confer a right of a citizen to the mine in controversy, this court should take jurisdiction. He also insists that the definitions of the terms "vein" and "crevice," given by the court to the jury, were not in accord with the meaning of one of these terms in the Federal, and the other in the State, statutes, and that jurisdiction therefore attaches. With reference to the first proposition, we have said that inasmuch as the plaintiff in error failed to plead the action of the Department as *res adjudicata* in the manner required by the practice of the State of Colorado, in consequence of which a demurrer to his plea was sustained, he cannot, by claiming that the testimony consisted of a Federal decision, magnify the case into one involving a right, title, privilege, or immunity claimed under the Constitution, or any treaty or statute of, or commission or authority exercised under, the laws of the United States. Counsel say that they do not rely upon these adjudications as showing that we had not a discovery at the time of our new application, but as *res adjudicata* prior to October 11, 1893. It is immaterial what their reliance or claim may be, if it is not made in a proper manner; and whether the decisions of the State courts upon this question of practice be or be not correct, it is not subject to review here. The multitude of decisions cited by counsel and referring to the effect in the courts of an adjudication by the Land Department without exception have reference to cases where the title had been perfected or passed out of the Government as a result of such ruling. If because of some decision canceling one entry the land covered by it became at once public domain, or if it precluded the renewal of an application for patent therefor, it would be easy to find a statute, a decision, or a rule embodying the doctrine. It is sufficient for us to say that neither has yet been called to the attention of the court, while a number of the de-

cisions of the Land Department to the contrary have been collated by the supreme court of Colorado in its original decision herein.

But counsel say that back of the cancellation of our original entry was a trial of a distinct issue of fact, and an adjudication that we had not made a discovery of a vein, and that adjudication, it is claimed, has not been respected. Apart from the question of defective pleading, it is conclusive, we may say, that back of practically every adjudication is some distinct question of fact. That mere circumstance may or may not make the adjudication conclusive in succeeding litigation, but it is certainly not the test. That depends upon other conditions clearly pointed out by the supreme court of Colorado in the opinion affirming the judgment. The second application for patent necessarily stood or fell upon its own merits. Counsel seem to concede that we had a right to make it. If we did, then surely the first and unsuccessful application is unimportant, except in so far as it was based upon evidence which contradicted or was inconsistent with that upon which the second was supported.

Counsel lays great stress upon the alleged fact that the defendants in error had made no discovery of mineral prior to October 11, 1893, and therefore must have made one subsequent to that of the Tecumseh. The first assertion is based upon the construction necessarily given by the Department to the testimony under the protest as to the existence of a vein formation in the Ophir shaft prior to the date mentioned. It also assumes a discovery by the Tecumseh. As to the first, the testimony was positive at the hearing of the protest that ore carrying three or four dollars in gold per ton was found in the shaft. The second was a controverted point before the jury, by whose verdict it was decided that the Ophir discovery, whenever it was made, was senior to any discovery in the Tecumseh. As to the last point, the testimony was directly in conflict. The

plaintiff swore to a vein in the discovery of Tecumseh shaft, and the defendants in error not only introduced witnesses to the contrary, but hundreds of assays, taken from every conceivable part of the shaft, none of which showed any values. There is nothing in the verdict upon this point to suggest a Federal question.

Since counsel are in doubt as to the Federal character of the issue of estoppel *in pais* we will pass it without consideration.

The third division of the brief is devoted exclusively to the decisions of the Secretary. As before cited, these decisions are entitled to consideration in all proper cases and under all proper issues.

The application of cited authorities to the point under consideration may be well illustrated by the case of Krekeler *vs.* Ridder, 62 N. Y., 372, cited by counsel. That case decides that although the record of a former judgment is not admissible as a bar without being pleaded; yet when the issues have been adjudicated in a former action between the parties, the judgment is proper as evidence of the facts established thereby, though not pleaded. The decision of the Secretary, as between the parties hereto, was one which concerned only the Government and the defendants in error, and was one which did not, and could not, determine the points at issue. It has been frequently determined, not alone by Federal courts, but by the Department, that certain questions relating to the patenting of mining claims are exclusively judicial when controverted, and do not belong to the Department to determine, but to the courts. One of these is the question of the discovery of a vein and its character. It came up incidentally under the protest to the first application for patent filed under section 2329, Revised Statutes of the United States, which, notwithstanding the failure to file an adverse claim, gives the right to citizens to show that the applicant has failed to comply with the terms of the chapter. A failure to comply with

the terms of the chapter concerning applications for patent gives the Department the power to cancel an entry because of such failure. If it does this, and the applicant, upon a second application, does comply with the terms of the chapter, then it is difficult to conceive how a decision sustaining such failure in the first instance can be used to show that such failure also exists in the second application. If counsel in pleading this decision had succeeded in passing the objections raised by demurrer, or these objections having been sustained, he had amended so as to bring himself within the judicial requirement, there would have been less objection to the introduction of the decisions. His plea was obnoxious to the demurrer and he made no application to amend. This determines his present contention.

The decision from New York, like the other decisions, do not determine that an opinion upon which the decision is based can be introduced in evidence. The judgment of the Department, like the judgment of the court, is one thing; the opinion embodying the reasons therefor is another. The first, under normal conditions, is good testimony; the second is not, and cannot be. No attempt was made to offer the judgments of the Department on the first application, but the opinions of the officials merely.

The criticism of counsel, based upon Insurance Co. *vs.* Hayden, 21 Colo., 127, is so fully refuted by the Supreme Court itself in its opinion upon the petition for rehearing that we will content ourselves by merely referring thereto.

The question of annual labor is in no sense a Federal one. It is purely an issue of fact. The statute needs no construction. Evidence was introduced over the objection of defendants in error concerning the expenditure upon the Ophir claim for the year succeeding the institution of the action. Plaintiff estimated the value of the work by its extent. The defendants gave evidence showing their actual expenditure, which far exceeded the sum of $100. Counsel quotes the testimony of one witness to the effect that he ran

a drift seven or eight feet, and that it was worth $12 per foot. He fails to quote Mr. Cone as fully as he should have done, for that defendant not only testified as to what he paid for the work, but gave items for powder, fuse, tools, and provisions in addition to the $12 per foot, which the jury accepted as satisfactory under the instructions of the court, and declared that the law had been complied with.

Counsel seem to us to labor under the delusion that if the owner of a claim fails to expend the required $100 upon it for a given year, the premises at once revert back to the public domain. The books are full of decisions to the effect that the defaulting owner may comply with the statute, notwithstanding the year has expired, at any time before a third person attempts to relocate the premises. In other words, the forfeiture is not enforced by the Government, but other citizens may, if they choose, take advantage of the default by relocation. Hence the decisions are uniform that none but a relocator can raise the question or rely upon it. There is not only no Federal question involved here, but no question of any dispute at all, for no pretense of relocation was made.

We fail to comprehend how the plaintiff can claim any right of review here upon his contention that the act of Congress authorizes a location to be made upon a discovery anywhere within the limits of the claim, and that such authority has been violated. The section which he quotes makes a discovery a condition precedent to location. His plea is that he made two in some other part of the claim than the discovery shaft after the location, and consequently is entitled to recover for that reason. The difficulty with counsel is that he overlooks the fact that the jury found with the defendants in error in their contention, first, that the plaintiff in error never made any discovery whatever in his discovery shaft, and, second, that the Ophir discovery was senior to all others upon the premises. This was the principal issue involved in the trial, and its determination

should conclude the controversy. The case of Gwillim *vs.* Donovan, 115 U. S., p. 45, which arose under the Colorado statute, decided that if the owner of a claim permitted his discovery shaft to be patented to another location, he thereby destroyed his own. In other words, the discovery shaft is the heart and life of the claim, and its loss cannot be survived. This necessarily means that the vein upon which the claim is located must be found within the discovery shaft, and if not so found, the fact cannot be cured by the claim that a vein exists somewhere else.

Under the query "What is a vein?" counsel cite a multitude of definitions. They are all good, and we have no objection to any of them. Others with equal propriety might be cited, but we do not perceive how they can affect the question of jurisdiction. The term has been defined so often and so frequently that the existence or non-existence of one has become exclusively a question of fact. The jury is, of course, its arbiter. The plaintiff's contention that if *a crevice* is found in the discovery shaft *a vein* can be found anywhere else is a distinction without a difference. The term "crevice" does not appear in the Federal statutes at all, and if it means in mining parlance something different from the vein, an incorrect definition by the State court could not confer the right of review here. If, as our courts have frequently declared, it is in the State mining statutes but another name for a vein, then a mere crack in the rock, containing no mineral whatever, is not a "crevice," and therefore not a compliance with the State statute if nothing else is found in the discovery shaft (Bryan *vs.* McCaig, 10 Col., 309; Cheesman *vs.* Shreve, 40 Fed., 787). Counsel complains, however, that the act of Congress has been violated in this trial, because the definitions of the term "vein" or "crevice" given by the trial court and sustained by the supreme court were not in harmony with the facts on either side. If the record were printed so that the court could comprehend the facts, it would soon ascertain

that the instructions were not only an aid to the jury, but essential to an understanding of the case. The defendants showed by well-authenticated assays running as high as $75 to the ton the presence of ore in the rock in place in the Ophir shaft from a point about 22 feet from the surface downwards. That which the plaintiff insists was alone the vein, to wit, a crack or seam in the rock formation, came into the shaft at a point about twenty-seven or twenty-eight feet from the surface. Our contention was and is that it is the mineralized zone which constitutes the vein, and that wherever a continuous body of rock can be found carrying the precious metals in appreciative quantities a vein in legal contemplation exists, although its boundaries can be determined only by assay. This view was declared by the United States circuit court for the district of Colorado, in Hyman *vs.* Wheeler, 29 Fed. Rep., 347, and by this court in Mining Co. *vs.* Cheesman, 116 U. S., 529, and has since been approved everywhere. The defendants' contention, as we understand it, is that the crack or seam through the ore is the vein, even though its walls consist of pure gold or silver, and consequently that the court should have told the jury that a vein, as understood in Federal statutes, consisted of a crack merely, or a fissure, as the term is sometimes used. The abundant testimony at the trial sustained the proposition that the walls of the fissures or seams in Cripple Creek mining district are frequently so impregnated with gold as to be more valuable than the actual fissure itself; that the limits of the ore formation could not be determined in many cases by the eye, the touch, or the hammer, but by chemistry alone, and that veins, although consisting of fissures, frequently there consisted both of fissure and of wall. These made the various definitions given by the court an essential part of its duty to the jury. Scientific men declared that in such instances the walls or boundaries of the lode were the points where the rock ceased to be valuable. By that test a vein or crevice began where

the ore did and ended where the ore did, whether within the actual seam or fissure or outside of it. In any event, the jury having determined that the Tecumseh had no vein, we submit that it is immaterial whether the ophir found it at the depth of 22 feet, 35 feet, or any other number of feet.

As cited in our brief in support of the motion to dismiss, these so-called Federal questions upon which the plaintiff in error now asks for a supersedeas have been injected into the case since its determination by the supreme court. It will not do to say that they were generally included within the assignments of error there made. No Federal question, as such, was called to the attention of the State court, nor did that court consider the case from that standpoint. If we were the losing party, no appeal to this court would be possible. The fact that the plaintiff in error was the losing party does not change the situation.

A concluding reflection upon the character of the Ophir discovery is that there can be but two forms of location under the Federal mining statutes—one for placers and one for lodes. If the definitions given by the court upon the testimony were incorrect, the Ophir could only be located as a placer. This court is too familiar with the distinction between placer and lode deposits to justify its elaboration here.

We ask that the application be denied, if considered at all, and that the case be dismissed for want of jurisdiction.

Respectfully submitted.

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